

# **Family law disputes involving EU after Brexit: guidance for legal professionals**

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# Cross-border family law disputes after Brexit: guidance for legal professionals

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## Summary

Guidance for legal professionals on cross-EU border family law disputes (including divorce and child maintenance) after Brexit if the UK leaves the EU without a deal.

## Detail

This guidance is provided for the information of legal practitioners involved in family law in Scotland and the EU in the event that the UK leaves the EU without a deal. It is not legal advice. It is not a complete statement of the law.

Practitioners should be aware that they may need to consider leading judgments from the UK courts and judgments from the Court of Justice of the European Union (CJEU) where relevant.

Members of the public involved in cross-border family law disputes should read the guidance for the public.

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## 1. Divorce

### 1.1 Current law

#### Jurisdiction

The jurisdiction rules set out in Article 3 of Council Regulation 2201/2003, known as Brussels IIa, have been applied to all cases of opposite sex divorce, legal separation and nullity of marriage in Scotland whether or not the case has a cross border element.

The jurisdiction rules can mean that parties to a marriage may have standing to seise the court in a number of different Member States. Parallel proceedings are avoided by the *lis pendens* rule at Article 19, which states that the court second seised must stay its proceedings.

For further information, refer to the Brussels IIa regulation.

For dissolution, legal separation or nullity of a civil partnership and divorce, legal separation or nullity of a same sex marriage the Scottish Ministers have

made Scottish Statutory Instruments which broadly replicate the jurisdiction rules in Brussels IIa.

### **Recognition of orders**

Judgments on divorce etc. are generally recognised in other Member States without any special procedure, under Article 21. This is subject to the exceptions contained in Article 22.

A party seeking or contesting recognition of orders for divorce etc made in Scotland is required to produce the documents detailed in Article 37 and in particular the Article 39 certificate at Annex I to Brussels IIa.

An interested party (in Scotland or in an EU Member State) can apply for a court order that a judgment on divorce etc. should not be recognised.

## **1.2 After Brexit if the UK leaves without a deal**

### **Cases in Scotland**

#### ***Cases ongoing in Scotland on exit day***

##### **Jurisdiction**

Divorce proceedings ongoing in Scotland on exit day will continue under the current law and rules of Brussels IIa.

### **Recognition of orders**

If the UK leaves the EU without a deal, the court in Scotland will continue to recognise divorces granted in EU Member States in the same way under Brussels IIa, if the recognition proceedings started ahead of exit.

#### ***New cases in Scotland after exit day***

##### **Jurisdiction**

Brussels IIa will no longer apply to cases in Scotland. As retained EU law, it is revoked and provision made so that jurisdiction in divorce (whether of a mixed sex or same sex marriage) and in dissolution of civil partnership is based on whether either party is domiciled in Scotland when the action is begun or was habitually resident in Scotland for a year ending on that date.

For both same sex divorce and the dissolution of civil partnership, a “jurisdiction of last resort” is retained if the couple entered into their relationship in Scotland; no court has or is recognised as having jurisdiction and it appears to the Scottish court to be in the interests of justice to assume jurisdiction.

For further information, please refer to The Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [SSI 2019/104] and the accompanying Policy Note.

## **Recognition of orders**

The court in Scotland will, after a no deal exit, recognise divorces granted in EU Member States in the same way as they currently do for orders from non-EU countries. The rules on recognition are to be found in Part II of the Family Law Act 1986 which implemented the 1970 Hague Convention on the recognition of divorce and legal separations.

(The 12 EU Member States that are party to the 1970 Hague Convention on Divorce Recognition at the time of exit are Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Sweden.)

Part 5, Chapter 3 of the Civil Partnership Act 2004 makes provision on recognition of overseas dissolution of civil partnerships.

## **Cases in an EU Member State**

The European Commission has issued guidance about how ongoing cases should be handled in EU Member States after Exit. Practitioners are encouraged to read this guidance and reflect on what it means for individual cases.

## ***Cases ongoing in an EU Member State on exit day***

### **Jurisdiction**

The European Commission has given guidance to the EU-27 that for proceedings underway in EU Member States on exit day where the respondent is domiciled in the UK, the jurisdiction rules of Brussels IIa will apply.

### **Recognition of orders**

The European Commission has given guidance to the EU-27 that orders made in the UK before exit day which are to be enforced in EU Member States must have reached the stage of having obtained a declaration of enforceability (what we would call registration for enforcement) if Member States are to enforce them under the EU rules.

If a declaration of enforceability has been obtained in the relevant EU Member State before exit day for orders which require enforcement, the order will already have been recognised, since recognition precedes the declaration of enforceability.

Parties may wish to consider seeking local legal advice in the relevant EU Member State if possible.

### ***New cases in an EU Member State after exit day***

#### **Jurisdiction**

There is no international law on which court has jurisdiction for divorce etc other than Brussels IIa. This means that unless the EU instrument on the subject in question sets the rules of jurisdiction with regard to third countries, jurisdiction in cross border cases after exit day will be governed by the national rules of the Member State of the court to which application is made.

#### **Recognition of orders**

The recognition in an EU Member State of a decree of divorce granted in Scotland after exit day will be governed by each Member State's national rules of private international law, unless they are party to the 1970 Hague Convention on Divorce Recognition, in which case the rules of that Convention apply, for divorce and separation only.

The approach to the recognition of the divorce of same sex couples and the dissolution of a civil partnership varies significantly between Member States. Parties should seek local legal advice.

## **2. Maintenance**

### **2.1 Current law**

#### **Jurisdiction**

The court in Scotland currently applies the rules in Chapter II of the EU Maintenance Regulation 4/2009 to decide if it has jurisdiction to hear a maintenance case.

#### **Recognition and enforcement of decisions**

A maintenance decision made in Scotland that is to be recognised and enforced in another EU Member State must be recognised and must have a declaration of enforceability (registration for enforcement) before it can be enforced there. It should be accompanied by the documents required under Article 28, subject to the exceptions in Article 29.

A maintenance decision made in another EU Member State (except Denmark) that is to be recognised and enforced in Scotland does not need to be registered for enforcement. It should be accompanied by the documents required under Article 20.

For further information, refer to the Sheriff Court Child Care and Maintenance Rules.

## **2.2 After Brexit if the UK leaves without a deal**

### **Cases in Scotland**

#### ***Cases ongoing in Scotland after exit day***

##### **Jurisdiction**

The no deal exit legislation has saving and transitional provisions to the effect that cases which have started under the EU rules in the Maintenance Regulation will continue under those rules.

##### **Recognition and enforcement of decisions**

A maintenance decision made in an EU Member State before UK exit will be recognised in the UK under the rules of the Maintenance Regulation if an application for its recognition is received before exit day, even if the UK leaves the EU without a deal. That decision will then be enforceable under the EU rules after exit day in Scotland, even if the application for enforcement is received after exit day. Decisions incoming from Denmark will require registration for enforcement.

Maintenance decisions that have been enforced in the UK will continue in payment in the event of a no deal exit.

For further information, refer to the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations: and the related Explanatory Memorandum.

#### ***New cases starting in Scotland after exit day***

##### **Jurisdiction**

The EU Maintenance Regulation 4/2009 will be revoked by no deal exit legislation. For cases starting after exit, the court in Scotland will decide if it has jurisdiction using the rules in domestic law, unless parties have already made a choice of law agreement. These rules are different depending on the type of maintenance case before the court.

##### **Recognition of decisions**

In the event of no deal UK exit, the UK will use the rules of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance with other participating states, which include all EU Member States except Denmark. The 1973 Hague Maintenance Enforcement Convention will continue to operate between the UK and Denmark.

For further information, refer to the full 2007 Hague convention.

## **Cases in an EU Member State**

The European Commission has issued guidance about how ongoing cases should be handled in EU Member States after Exit. Practitioners are encouraged to read this guidance and reflect on what it means for individual cases.

### ***Cases ongoing in an EU Member State on exit day***

According to the guidance from the European Commission, legal proceedings involving “an individual domiciled in the UK” underway in EU Member States on exit day using the EU rules will be completed under the current EU rules.

#### **Jurisdiction**

The European Commission has given guidance to the EU-27 that for proceedings underway in EU Member States on exit day, where the respondent is domiciled in the UK, the jurisdiction rules of the EU Maintenance Regulation will continue to apply.

#### **Recognition of decisions**

The guidance from the European Commission states that a decision from the UK must have been registered (ie a “declaration of enforceability” must have been obtained) in the relevant EU Member State before exit day, for the EU Member State to enforce it under the EU rules.

It is not clear whether or not maintenance decisions from the UK which have been recognised in an EU Member State, but have not reached the stage of having obtained a declaration of enforceability under EU rules, will be able to continue to enforcement under the rules of the 2007 Hague Convention, or whether the parties will need submit a separate declaration under the 2007 Hague Convention after Exit. Parties may wish to consider seeking local legal advice in the relevant EU Member State if possible.

### ***New cases starting in an EU Member State after exit day***

#### **Jurisdiction**

The guidance from the European Commission states that where proceedings involve a UK domiciled defendant, unless an EU instrument sets out the rules of jurisdiction with regard to third countries, international jurisdiction will be governed by the national rules of the Member State in which the court is seized. To find out the law the court will apply with the UK after no deal exit, individuals should seek local legal advice if possible.

#### **Recognition of decisions**

The guidance from the European Commission states that in some instances international conventions will apply provided that both the EU Member States and the United Kingdom are party to the convention. All EU Member States except Denmark are party to the 2007 Hague Maintenance Convention so this

will enable the recognition of UK maintenance decisions in EU Member States after Exit.

### **Choice of court agreements within a maintenance case after exit day**

#### **In Scotland**

The court in Scotland will continue to recognise choice of court agreements in maintenance cases agreed in writing between all parties which satisfy the relevant conditions, even if the case is issued after exit day.

#### **In EU Member States**

There is no guarantee that the courts of EU Member States will accept choice of court agreements from Scotland after exit day.

### **Further information**

#### **Scope of the 2007 Hague Maintenance Convention**

The UK will operate the 2007 Hague Convention in the event of no deal exit both for new cases and for payments from before exit for the benefit of a person under 21, with EU Member States except Denmark. The UK has ratified the 2007 Hague Convention with the same declarations and reservations as before and the same scope as that applied by the EU, including spousal maintenance. The UK will in future consider wider application.

For further information, refer to the [2007 Hague convention](#).

### **Terminology differences between the 2007 Hague Maintenance**

#### **Convention and the EU Maintenance Regulation**

The EU Maintenance Regulation 4/2009 provides for the UK (and Ireland) to read “nationality” as “domicile”. The 2007 Hague Convention refers only to nationality.

The 2007 Hague Convention provides for the recognition and enforcement of maintenance decisions where the court which made the decision had jurisdiction for divorce, except if that was based on the nationality of one spouse. Therefore, where the court’s jurisdiction for the divorce relies on sole domicile, not nationality, it should be possible for any maintenance decision to be recognised and enforced under the 2007 Hague Convention.

## **3. International parental child abduction**

### **3.1 Current law**

The main provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction are incorporated into the law of the UK



jurisdictions by the Child Abduction and Custody Act 1985. All EU Member States are party to the 1980 Hague Convention and use it with the UK. This provides a summary procedure for children wrongfully removed or retained away from their country of habitual residence to be returned there, so that long-term decisions about the future of the child can be made. (Abduction includes both wrongful removal and wrongful retention.)

Members of the public whose child has been abducted out of Scotland should contact the Scottish Central Authority for information on what action to take. If the member of the public believes their child is at risk of abduction in future from any part of the UK they should contact the charity *reunite International Child Abduction Centre* for advice and information.

For further information refer to:

- [Child Abduction and Custody Act 1985](#)
- The Scottish Central Authority [application form and guidance](#)
- The [Court of Session Rules Chapter 70](#)
- Reunite International on 0116 2556234 or [www.reunite.org](http://www.reunite.org)

### **3.2 After Brexit if the UK leaves without a deal**

The UK and EU Member States will continue to use the 1980 Hague Convention in international child abduction cases between them.

## **4. Children cases (parental responsibility)**

Note: In EU terms parental responsibility includes residence and contact.

### **4.1 Current law**

#### **Jurisdiction**

Article 8 of Brussels IIa provides that jurisdiction in children cases generally rests with the court of the country of the child's habitual residence. Habitual residence is a question of fact which requires consideration of a number of factors. There are also other grounds of jurisdiction which may sometimes be relied upon. For example, under Article 12, the court with jurisdiction where there are divorce etc proceedings also has jurisdiction for proceedings about a child when at least one spouse has parental responsibility for that child and the relevant people agree the court should have jurisdiction.

For further information, refer to the [Brussels IIa regulation](#).

#### **Recognition of orders**

The general rule is that judgments on parental responsibility shall be recognised in other Member States without any special procedure, under Article 21. This is subject to the exceptions contained in Article 23.

An order made in Scotland is recognised and enforced in other EU Member States when accompanied by the relevant certificate, Annex II to Brussels IIa for parental responsibility, Annex III for rights of access, Annex IV for return of the child.

An order made in another EU MS is recognised and enforced in Scotland when accompanied by the relevant certificate as above.

For further details refer to The Court of Session Rules Chapter 70.

## **4.2 After Brexit if the UK leaves without a deal**

### **If the case is in Scotland**

#### ***Cases ongoing in Scotland on exit day***

##### **Jurisdiction**

Domestic no deal legislation provides saving and transitional rules for ongoing parental responsibility cases which will come into force if the UK leaves the EU with no deal. These allow parental responsibility cases which began under EU rules in the courts of Scotland before exit to continue under those rules in Scotland.

For further detail refer to The Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019.

##### **Recognition of orders**

If an application for recognition of a parental responsibility decision made in an EU Member State is received in Scotland before exit day, the order will be recognised under EU rules and will continue to be recognised after exit day.

#### ***New cases in Scotland after exit day***

##### **Jurisdiction**

Brussels IIa will no longer apply in Scotland after exit day. As retained EU law it is revoked by the Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019.

The court will instead make its decision on whether it has jurisdiction to hear private law cross border children cases in accordance with the rules of the 1996 Hague Protection of Children Convention.

In future, parental responsibility judgments from EU member states will be recognised under the 1996 Hague Convention. The Convention was implemented by the Parental Responsibility and Measures for the Protection

of Children (International Obligations) (Scotland) Regulations 2010 (SSI 2010/213).

### **If the case is in an EU Member State**

The European Commission has issued guidance about how ongoing cases should be handled in EU Member States after Exit. Practitioners are encouraged to read this guidance and reflect on what it means for individual cases.

### ***Cases ongoing in an EU Member State on exit day***

#### **Jurisdiction**

The European Commission has given guidance to the EU-27 that for proceedings pending in EU Member States on exit day, where the respondent is domiciled in the UK, the jurisdiction rules of Brussels Ia will continue to apply.

When the UK leaves the EU unless the EU instrument on the subject in question sets the rules of jurisdiction with regard to third countries, jurisdiction in cross border cases after exit day will be governed by the national rules of the Member State of the court to which application is made.

#### **Recognition of orders**

The European Commission has given guidance to the EU-27 that orders made in the UK before exit day which are to be enforced in EU Member States must have reached the stage of having obtained a declaration of enforceability (what we would call registration for enforcement) if Member States are to enforce them under the EU rules.

If a declaration of enforceability has been obtained in the relevant EU Member State before exit day for orders which require enforcement, the order will already have been recognised, since recognition precedes the declaration of enforceability.

Parties may wish to consider seeking local legal advice in the relevant EU Member State if possible.

### ***Transfer of cases after exit day***

The provisions of Brussels Ia could prevent a court in an EU Member State using the 1996 Hague Convention to transfer jurisdiction in children cases to the UK after no deal exit. The legal position on transfer of cases is not clear. Parties may wish to consider seeking local legal advice in the relevant EU Member State if possible.

## ***New cases in an EU Member State after exit day***

### **Jurisdiction**

The guidance from the European Commission states that where proceedings involve a UK domiciled defendant, unless an EU instrument sets out the rules of jurisdiction with regard to third countries, international jurisdiction will be governed by the national rules of the Member State in which the court is seised.

All EU Member States are party to the 1996 Hague Protection of Children Convention so it is expected that the court of an EU Member State in a case with a UK connection will apply the rules of the 1996 Hague Convention to decide whether it has jurisdiction in children cases.

For further information, refer to the [1996 Hague Convention](#).

### **Recognition of orders**

The guidance from the European Commission states that in some instances international conventions will apply provided that both the EU Member States and the United Kingdom are party to the convention. Recognition will be under the rules of the 1996 Hague Convention.

## **5. Placement of children**

### **5.1 Current law**

#### **Jurisdiction**

Under Brussels IIa, the court hearing public law care proceedings will normally be the court of the country of the child's habitual residence.

#### **Current procedure**

If the local authority wishes to propose to the court that the child be placed with a family member in another Member State, local authorities are required under the rules in the Brussels IIa Regulation to seek and obtain prior consent from the competent authority in the EU country where they wish to place the child, in cases where that authority is involved in domestic placements.

For further information, refer to: the full [Brussels IIa regulation](#).

### **5.2 After Brexit if the UK leaves without a deal**

#### **Jurisdiction**

Under the 1996 Hague Convention, the court hearing public law care proceedings will normally be the court of the country of the child's habitual residence.

**New procedure for EU Member States, current for non-EU countries**

If the UK leaves the EU with no deal, local authorities and social welfare authorities in EU Member States will use the rules in the 1996 Hague Protection of Children Convention on placements; under these rules they will need to seek and obtain consent to the placement in every case.



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